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IN THE

Supreme Court

OF THE

United States.

October Term, 1937.

No. 919

Estate of Julius C. Lang, Deceased, and Richard E. Lang, Executor, and Grace E. Lang, Executrix of the Estate of Julius C. Lang, Deceased,

vs.

Commissioner of Internal Revenue.

BRIEF AS AMICUS CURIAE.

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ESTATE OF JULIUS C. LANG, DECEASED, and RICHARD E. LANG, EXECUTOR, and GRACE E. LANG, EXECUTRIX OF THE ESTATE OF JULIUS C. LANG, DECEASED,

vs.

COMMISSIONER OF INTERNAL REVUNUE.

BRIEF AS AMICUS CURIAE.

Statement.

By permission of the Court, upon the consent of counsel for the respective parties, this brief is filed as *amicus curiae* on behalf of Vee Wolf Roberts as administratrix of the estate of Stephen R. Roberts, deceased.

Jurisdiction.

This cause was brought up to this Honorable Court by certificate to the Supreme Court of the United States of questions at law upon which the certificate of the Court of Appeals for the Ninth Circuit desires instructions for the proper decision of a cause therein pending.

Questions Presented.

In this brief as *amicus curiae* the undersigned will discuss only questions 1 and 4, certified to this Honorable Court as aforesaid.

The question presented by questions 1 and 4 of said certificate is as follows:

Where policies of life insurance written upon the life of a decedent at all times domiciled in the state of Washington, which policies were applied for after the marriage of the decedent, the proceeds of which were payable to his wife and the premiums on which were paid entirely with community funds of said decedent and his wife, are the full amounts or only one-half of the proceeds of such policies (less permissible exemptions) to be included in the husband's gross estate subject to the federal estate tax?

Statutes and Regulations Involved.

The section of the Revenue Act involved is Section 302 (g), of the Revenue Act of 1926.

The regulations of the Commissioner of Internal Revenue involved are Articles 25 and 28 of Regulations 70, and Articles 25 and 27 of Regulations 80, as amended by T. D. 4729, approved March 18, 1937.

That Section 302 (g) aforesaid, and the regulations involved are printed in Appendix A, pages 25 to 28, inclusive.

Statement of Facts.

For a complete statement of the facts here involved see certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instructions for the proper decision of the cause.

Summary of Argument.

Argument of *amicus curiae* will be divided into three major subdivisions:

A. The law of the state of Washington gives the wife an equal and existing interest in the community funds.

B. Section 302 (g) of the Revenue Act of 1926 requires the inclusion (less permissible exemptions) in the gross estate of the husband of only one-half of the proceeds of insurance paid with community funds, this being the extent of the husband's interest in and to said insurance.

C. Should this Court deem the applicable regulation to be Articles 25 and 27 of Regulations 80, nevertheless, it is the contention of *amicus curiae* that only one-half of the proceeds of the life insurance policies must be included in the gross estate of the decedent.

ARGUMENT.

I.

There should be included in decedent's gross estate only one-half of the full amount of the insurance proceeds which were purchased out of community funds of spouses domiciled in the state of Washington since the inception of their marriage.

A. The law of the state of Washington gives the wife an equal and existing interest in the community funds.

This Honorable Court has previously had occasion to pass upon the community property laws of the state of Washington and the respective interests of the spouses therein. In *Poe v. Seaborn,* 282 U. S. 101, 51 Sup. Ct. 58, 75 L. Ed. 239 (1930), this Court stated:

> "We are of the opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband than it could rightfully be termed that of the wife." (282 U. S. 101, 113.)

The wife's right in the community property under the laws of the state of Washington is an absolute and vested one, equal in all respects to that of her husband.

> *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634;
> *Poe v. Seaborn, supra;*

and with respect to the community property the husband is merely a statutory agency created for the convenience of the community, and this statutory agency does not in

any wise differentiate the property interests of the husband in the community estate from that of the wife.

> *Warburton v. White,* 176 U. S. 494, 20 Sup. Ct. 404, 44 L. Ed. 555;
>
> *Poe v. Seaborn, supra;*
>
> 32 *Op. A. G.,* at 458;
>
> *Occidental Life Insurance Co. v. Powers et al.,* ....Wash............., 74 Pac. (2d) 27 (1937);

nor does the husband have a right either of property or agency entitling him to alienate the interest of the wife in community property.

> *Poe v. Seaborn, supra;*
>
> *Schramm v. Steele, supra;*[1]
>
> *Occidental Life Ins. Co. v. Powers et al., supra.*

The Supreme Court of Washington has determined that the proceeds of insurance policies purchased out of community property were the community property of the hus-

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[1]The Supreme Court of Washington, in *Schramm v. Steele, supra,* said:

> "The husband is made, by the statute, the manager, not the owner. His management and control include the power of absolute disposition, but only for the community.
>
> "* * * These considerations make it plain that the statute, in conferring upon the husband the management and control of the community property, though giving him the absolute power of disposition of community personalty, intends no more than to make him the statutory agent of the community."

band and wife in the same manner as investment in any other type of property.

> *Occidental Life Insurance Co. v. Powers et al., supra;*
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> *Shields v. Barton,* 60 Fed. (2d) 351 (C. C. A. 7th, 1932);
>
> *New York Life Insurance Co. v. Bank of Italy,* 60 Cal. App. 602, 214 Pac. 61;
>
> *Modern Woodmen of America v. Gray,* 113 Cal. App. 729, 299 Pac. 754;
>
> *Union Mutual Life Insur. Co. v. Brockerick,* 196 Cal. 497, 507.

The local law of the state is determinative of the property rights of the parties involved and in defining terms which are not otherwise defined in the taxing statute. *(Poe v. Seaborn, supra.)*

It is upon the application of this rule that the Circuit Court of Appeals for the Fifth Circuit decided in the case of *Newman v. Commissioner of Internal Revenue,* 76 Fed. (2d) 449 (1935), that the proceeds of insurance policies taken out by a husband in Louisiana were includable in the husband's gross estate for federal estate tax purposes. The Court, in the *Newman* case, applied the law of Louisiana, which, it will be noted from the decision, differs in many material respects from the community property laws of Washington and California with reference to the nature of the community interest in insurance.

It appears from the decision in the *Newman* case that the Louisiana wife has no interest in the insurance policies and that she acquires the proceeds thereof as a gift from the husband at the time of his death. It appears

that the wife does not have even an expectancy and thus the husband could defeat the wife of receiving any of the proceeds of said policies by changing the beneficiary thereof prior to his death. Such is not the rule in Washington and California, where the wife has a present, vested and equal interest in the insurance policies and the proceeds thereof with the husband, as shown by the cases cited above.

Further, in the *Newman* case, the Court said:

> "The tax is not upon the proceeds of the policies; it is not upon the interest to which the beneficiary *succeeded* at death, but upon the right of disposition and control the insured had at death. The decedent possessed until his death the full right to change the beneficiary. The tax rests on this fact."
>
> *Newman v. Commissioner of Internal Revenue, supra,* at 450.

A Washington or California husband as above stated has no right to change the beneficiary so as to defeat the wife of her vested one-half interest in the insurance policies or the proceeds thereof; nor does a Washington or California wife *succeed* to the proceeds of an insurance policy, as shown by the cases cited above.

It appears, therefore, that the community property laws of Louisiana do not apply to the proceeds of life insurance policies. See *Ticker v. Metropolitan Life Ins. Co.*, 11 Orleans App. 59, and *Martin v. McAllister,* 94 Tex. 567, 63 S. W. 624, the latter of which cases was relied upon in the *Newman* case, at page 452.

Nor does it appear from the decision in the *Newman* case that the question as to the meaning of the phrase

"taken out by decedent" was presented to the Court for determination, the Court apparently assuming, at page 452 of its decision, that the policies were taken out by the decedent. Compare *Walker v. United States*, 83 Fed. (2d) 104 (C. C. A. 8th, 1936).

We submit, therefore, that *Newman v. Commissioner of Internal Revenue, supra,* though it may perhaps be correct in its holding as applied to Louisiana, can be of no authority in its application to the local laws of Washington and California.

B. Section 302 (g) of the Revenue Act of 1926 requires the inclusion (less permissible exemptions) in the gross estate of the husband of only one-half of the proceeds of insurance paid with community funds, this being the extent of the husband's interest in and to said insurance.

Section 302 (g) reads as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *
>
> "(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The Commissioner of Internal Revenue under his statutory duty did, from 1918 until 1934, provide in his regulations that the test of whether a policy of life insurance was "taken out by the decedent" was whether the decedent

paid the premiums either directly or indirectly, and to the extent that the premiums were not paid by the decedent, the proceeds were not includable in his gross estate.

The retention of legal incidents of ownership prior to 1934 was not specified as a test and was of importance only in deciding whether certain portions of the Revenue Act of 1926 were to be applied retroactively.

> *Helvering v. Reybine,* 83 Fed. (2d) 215 (C. C. A. 2d, 1936).

The premium payment test adhered to by the Commissioner of Internal Revenue was promulgated first in Regulations 37 issued under the Revenue Act of 1918, and was re-promulgated by the Commissioner substantially in the same language in Regulations 63, interpreting the Revenue Act of 1921, in Regulations 68, interpreting the Revenue Act of 1924, and in Regulations 70, interpreting the Revenue Act of 1926. The applicable portions of said Regulations 70 are set forth in Appendix A; and the applicable portions of said Regulations 37, 63, and 68 are set forth in full in Appendix B.

Section 302 (g), first enacted into the Federal Estate Law in 1919, has been re-enacted in substantially the same form in the Revenue Act of 1921, the Revenue Act of 1924, the Revenue Act of 1926, and the Revenue Act of 1932.

It is a fundamental principle of tax law that when legislative enactments have been re-enacted consistently in continued contemplation of a particular administrative interpretation by way of regulation that the subsequent acts are deemed to have given legislative approval to the administrative regulation. (*McFeely v. Commissioner of Internal Revenue,* 296 U. S. 102, 80 L. Ed. 83; *National*

Lead Co. v. United States, 252 U. S. 140, 40 Sup. Ct. 237, 64 L. Ed. 490 (1920); *McCaughn v. Hershey Chocolate Co.,* 283 U. S. 488, 52 Sup. Ct. 510, 75 L. Ed. 1183 (1931); *Helvering v. Bliss,* 293 U. S. 144, 55 Sup. Ct. 17, 79 L. Ed. 246 (1934); *Walker v. United States,* 83 Fed. (2d) 104 (C. C. A. 8th, 1936).)[2]

Article 25 of Regulations 70 draws a distinction between cases where the insured paid the premium and cases where the beneficiary paid the premium. Thus the regulations provide "the insurance is not deemed to be taken out by the decedent, even though the application is made by him where all the premiums are actually paid by the beneficiary". Where a portion of the premiums are paid by the beneficiary and the remainder of the premiums are paid by the decedent, the regulations state that the policies are to be deemed to have been taken out by the insured in the proportion that the premiums paid by him bear to the total of premiums paid.

Article 25 of Regulations 70 was involved in the decisions of *Helvering v. Reybine, supra,* and *Walker v. United States, supra,* in each of which cases insurance policies had been applied for by the decedent but a portion of the premiums had been paid by the beneficiary.

In the *Reybine* case two of the policies in question were issued in connection with certain trusts created by the

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[2]In addition to the administrative construction placed upon the words "taken out by the decedent", we have the judicial construction prior to the passage of the Revenue Act of 1932 of said phrase in the case of *Wilson v. Crooks,* 52 Fed. (2d) 692 (D. C. Mo., 1931), which was then the leading decision interpreting Article 25 of Regulations 70.

insured and the trustees of the trust were named as beneficiaries of the policies. The insured only waived his right to make changes in the beneficiaries of the two policies in question "during the continuance of the trusteeship of certain specified trustees". The insured had the right to remove the trustees during his life and the minority of his children. The decedent died at a time when his children were minors and also when the original trustees were no longer functioning. The Court found the insured had it within his power at the time of his death to *change the beneficiaries of the two policies in question.* Premiums for three of the five years prior to the death of the insured during which time the policies had been in force had been paid by the insured but for the two years preceding the death of the insured the trustees had paid the premiums out of trust income. The Court held that under Article 25 of Regulations 70 the amount of the insurance must be prorated in the proportion which total premiums paid by the insured bore to the total premiums paid by the trust notwithstanding the fact that the insured, at the time of his death, *possessed the important legal incidents of ownership.* As the Court said:

> "The trustees paid these premiums (i. e., the portion paid by the trust) and kept the policies alive. The insured's estate should not now be called upon to pay the tax on all. It would be unjust to tax as part of the decedent's estate that which had been bought and paid for by another." (83 Fed. (2d) 215, 217.)

Likewise, in *Walker v. United States, supra,* decedent had applied for certain policies of insurance in which his wife was made the beneficiary. The wife paid approximately one-half the premium payments made before the death of the husband as to certain of said policies. The

decedent, during his lifetime, possessed the legal incidents of ownership of said policies. The Court after an exhaustive treatment of the legislative re-enactment of section 302 (g) of the Revenue Act, in the light of the administrative interpretation of this section, held that the portion of the proceeds of the insurance policies represented by the premiums paid by the wife should not be included in the gross estate of the decedent.

In the instant case, in addition to the fact that the wife, by virtue of her existing and equal interest in the community property with the husband, paid one-half of the premiums from which the proceeds here under consideration flowed, the decedent in the instant case (as the decisions cited under point "A" of this brief hold) possessed the legal incidents of ownership as to only one-half of the policies here under consideration and, hence, of the proceeds.

In harmony with this Court's decision in *Poe v. Seaborn, supra,* it is proper to consider the law of Washington in determining the property interests upon which the Federal Tax Act is to be applied.

It is, of course, obvious that technical terms in a federal taxing statute are to be accorded the definition specified in the statute, if there is any such definition, and the meaning need not necessarily be the same as might be placed upon the same term under local law. For example, if the term "net estate" is defined in a taxing statute as the gross estate less certain specified deductions the definition of the local law of the term "net estate" would be immaterial. (*Porter v. Commissioner,* 288 U. S. 436, 53 Sup. Ct. 451, 77 L. Ed. 880 (1933).)

However, somewhere along the line there must be terms which are not defined in the taxing statute and in such

event local law is of importance. An example of this fact is found in the leading case of *Poe v. Seaborn,* 282 U. S. 101, 51 Sup. Ct. 58, 75 L. Ed. 239 (1930), where the statute involved imposed a tax upon the net income of individuals. No definition was given of the term "income of individuals" which could guide the Court in determining whether community property income was to be divided between husband and wife. The Supreme Court said, "The act goes no farther, can furnish no other standard or definition of what constitutes an individual's income." Thereupon the Court examined the laws of the state of Washington from which state the particular case in question had arisen and decided that under the statutes of the state community property income of a husband and wife should be apportioned between the husband and wife.

Two decisions interpreting section 302 (g) have similarly applied state law to ascertain whether insurance was taxable. In *Levy's Estate v. Commissioner,* 65 Fed. (2d) 412 (C. C. A. 2d, 1933), the question was whether the provisions of the Revenue Act of 1924 could be applied to certain policies issued prior to 1916. The husband had irrevocably named his wife as beneficiary of these policies. The Court looked to the law of New York, where the policies were taken out, to ascertain whether, under such a situation the husband would have the right to surrender the policies without the consent of the wife. Since the New York decisions held that under the circumstances outlined the consent of the wife was required to a surrender of the policies the Court decided that the statute could not be retroactively applied.

In *Pennsylvania Co. etc. v. Commissioner,* 79 Fed. (2d) 295 (C. C. A. 3d, 1935), cert. den. 296 U. S. 561, 56 S. Ct. 310, a similar result was reached. Here with

reference to one policy which had evidently been taken out a long time prior to the date of the death of the deceased, the decedent had named his wife as beneficiary. While the deceased had not expressly waived his power to change the beneficiary he had not expressly reserved the power. Under the laws of Pennsylvania, where the policies were issued, unless the power to change the beneficiary was specifically reserved the right was deemed waived. The Court applied this Pennsylvania doctrine and held that because the wife was the irrevocable beneficiary the policy could not be surrendered or borrowed upon without the consent of the wife, and therefore the estate had no interest in the policy at the date of the death of the decedent and upon which an estate tax could be imposed.

Accord:

Helvering v. Parker, 84 Fed. (2d) 838 (C. C. A. 8th, 1936).

In the instant case we have a situation directly comparable to that presented to the Supreme Court in *Poe v. Seaborn, supra.* The Estate Tax Law provided for the inclusion of certain insurance under policies "taken out by the decedent upon his own life". No definition is given with respect to when insurance is to be deemed "taken out by the decedent". Article 25 establishes as one test whether the premiums were paid by the beneficiary but this article does not define when premiums are to be deemed paid by the beneficiary. If the Supreme Court of the United States looked to the law of Washington to see what effect community property laws have upon the term "income of every individual" we submit the law of Washington should be examined to determine what effect community property laws would have in determining whether premiums were "paid by a beneficiary".

Under the decision in *Poe v. Seaborn, supra,* income of the community in Washington is to be divided into two portions, one portion of which is to be deemed the income of the husband and the other portion, equal in amount to the husband's interest, is to be deemed the income of the wife. If the premiums on a life insurance policy are paid from community property funds, in the light of the decision in *Poe v. Seaborn,* half of the premiums so paid must be deemed to have been paid from the income of the wife and the remainder from the income of the husband. If a portion of the proceeds has been paid from the income of the wife it is submitted that the conditions of Article 25 of Regulations 70 have been met and the wife has paid a portion of the premiums of the policy, and one-half of the proceeds of such policies are not includable in the gross estate of the decedent.

It would seem to follow from the legislative re-enactment of section 302 (g), in the light of consistent interpretation by the Commissioner, that Regulations 80 is invalid.

It was not until 1934, more than sixteen years after the original enactment of the statute, which statute had been repeatedly re-enacted without substantial change, that the Treasury Department endeavored to change the portion of the regulations above quoted in a material respect. The foregoing history presents an even stronger case for the invalidity of the belated ruling of the Treasury Department than in *Helvering v. Bliss,* 293 U. S. 144, 151, 55 Sup. Ct. 17, 79 L. Ed. 246, 251 (1934), where the Supreme Court said:

> "Moreover, from 1923 to 1932 the Commissioner uniformly ruled that the deduction for charitable contributions was to be taken from net income before

computation of the tax and from ordinary net income. The reenactment in later acts of the section permitting the deduction indicate congressional approval of this administrative interpretation."

Accord:

Mayes v. Paul Jones & Co., 270 Fed. 121, 129, 130 (C. C. A. 6th, 1921).

In *Walker v. United States*, 83 Fed. (2d) 103 (C. C. A. 8th, 1936), the very regulations involved in the instant case were under discussion, the Commissioner contending that Article 25 of Regulations 70 was clearly an erroneous regulation and that Article 25 of Regulations 80, which placed the emphasis upon the incidents of ownership as controlling the taxability of insurance on the life of the decedent, was the correct interpretation of section 302(g) of the Revenue Act. The Court held Article 25 of Regulations 80 invalid.[3]

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[3]"* * * But, if the courts consider themselves bound to follow executive constructions approved by congressional reenactment unless such constructions are 'plainly erroneous', it must follow that they should consider the executive similarly bound and regard * * * subsequent construction by the executive from that standpoint. * * * In *Bliss v. Commissioner* (C. C. A.), 68 Fed. (2d) 890, 893, the Second Circuit held that the subsequent change by the Commissioner did not prevent application of the above rule of construction, and in *Mayes v. Paul Jones & Co.* (C. C. A.), 270 Fed. 121, 129, 130, the Sixth Circuit denied any power in the executive to change, by subsequent regulation, where Congress had adopted a long-continued prior departmental construction.

C. Should this Court deem the applicable regulation to be Articles 25 and 27 of Regulations 80, nevertheless, it is the contention of *amicus curiae* that only one-half of the proceeds of the life insurance policies must be included in the gross estate of the decedent.

Article 25 of Treasury Regulations 80 (full text set out in appendix) established an alternate test to the premium payment test and provided that even though the premiums were paid by the beneficiary the entire proceeds could be considered if the decedent possessed any of the legal incidents of ownership in the policy.

Legal incidents of ownership included such items as the right to the economic benefits of the policy, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a

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"Here Regulations 80 is, in part, a reversal or at least a limitation of Regulations 70. Where Regulations 70 excluded from taxation the proportion of the insurance proceeds paid for by the beneficiary, Regulations 80 does so only if no incidents of ownership in the policy remained in the insured during lifetime. In 70 (as in the earlier Regulations 68), the criterion is payment of premium. In 80 it is incidents of ownership. Considering the language of the statutory provision, it would seem the standard of construction laid down in Regulations 70 is more consonant therewith than that of 80 in those respects where the two are in conflict. At least it is clear that Regulations 80 has not revealed a standard which shows Regulations 70 to be 'clearly erroneous'. The result is that the later regulation cannot under the situation here, be held to replace or change the effect of the earlier regulation; * * *." *Walker v. United States,* 83 Fed. (2d) 103, at 109, 110.

loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

Under the law of the state of Washington the husband is merely a statutory agent of the community and has no right to alienate the interest of the wife in the property.

> *Poe v. Seaborn,* 282 U. S. 101, 51 Sup. Ct. 58, 75 L. Ed. 239 (1930);
>
> *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634;
>
> *Occidental Life Insurance Co. v. Powers et al.,* ...... Wash. ......, 74 Pac. (2d) 27 (1937).

It is our contention that Article 25 of Regulations 80 would not apply in so far as the husband, under the community property law, would hold a portion of the economic benefits in trust for the wife. In this respect the decision in *Poe v. Seaborn, supra,* appears controlling. In *Poe v. Seaborn, supra,* the argument of the Government was based upon the contention that, since the husband had the economic benefit of all of the income, an income tax could be levied. As the Court epitomized the argument of the Commission "he asserts that control without accountability is indistinguishable from ownership". In rejecting this contention the Court stated:

> "We are of the opinion that, under the law of Washington, the entire property and income of the community can no more be said to be that of the husband than it could rightfully be termed that of the wife." (282 U. S. 101, 113.)

This is just restating that the economic benefits of the community property belong no more to the husband than to the wife and that the only measure of control that may be given to the husband is as a trustee. In view of

this decision it cannot be said that the husband has the economic benefits required by Article 25 of Regulations 80 any more than a trustee, for example, with power to surrender a life insurance policy and hold the proceeds for the benefit of the beneficiaries of the trust can be said to possess the economic benefits of the policy.

The construction here urged will bring the application of the Federal estate tax as applied to life insurance purchased with community funds in conformity with the interpretation of the Federal Estate Tax Act to community property other than insurance. The Federal estate tax law requires the inclusion of only the one-half interest of the decedent husband in and to the community property.

> *Wardell v. Blum,* 276 Fed. 226 (C. C. A. 9th, 1921); cert. den. 258 U. S. 617, 42 S. Ct. 271.[4]

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[4]It should be noted that, although this case was not followed in later cases because under the Court decision in *United States v. Robbins,* 269 U. S. 315, 46 Sup. Ct. 148, 70 L. Ed. 285 (1926), the fundamental basis upon which *Wardell v. Blum* was decided, namely, that a wife in California had a vested interest in the community property (prior to 1927), was not sustained, yet the reasoning of that case is not affected in its applicability to the state of Washington, since, in *Poe v. Seaborn, supra,* the Supreme Court has declared that the wife does have a vested interest in community property in that state. *Estate of Louise Morris Carroll,* 29 B. T. A. 11 (1933), 32 Ops. Attorney General 435, at 458, G. C. M. 7773, C. B. IX-2, p. 426; *Security-First National Bank of Los Angeles v. Commissioner,* 35 B. T. A. 815, at 824, 825 (1937).

It would seem that Congress intended that insurance should be taxed at least on a no less favorable basis than other property.

In this connection we desire to present to the Court a hypothetical case suggested by the *Estate of Louise Morris Carroll, supra.* Suppose that a life insurance policy, the premiums of which have been paid out of community funds, has been in force and effect for a long while and that the cash surrender value of the policy is almost equivalent to the face value of the policy. Let us suppose, further, that the beneficiary surrenders the policy, shortly before his death, and at his death still has in his possession the entire cash surrender value of the policy. Under all of the applicable decisions, *supra,* it seems that the estate of the decedent husband would only include half of the funds so in the decedent's possession within the estate tax return, whereas, if insurance had not been surrendered and had been in force and effect at the date of the death of the decedent, the construction of section 302(g) reached in the case at bar by the Commissioner would deny to the community the one-half exemption accorded other community property—obviously an inequitable and unwarranted discrimination against insurance.

The construction of section 302(g), here urged by *amicus curiae,* would likewise harmonize the taxing of the proceeds of life insurance policies with that portion of the Federal Estate Tax Act imposing a tax on joint tenancies and tenancies by the entirety. Under section 302(e) of the Revenue Act of 1926, imposing a tax upon joint tenancies and tenancies by the entirety, the amount contributed by the surviving joint tenant or surviving tenant by the entirety is excepted from taxation.

Under the reasoning of *Poe v. Seaborn, supra,* the wife, in the case at bar, has contributed one-half of the funds used to purchase the proceeds of the life insurance policies here involved. If, as has been intimated in *Newman v. Commissioner, supra,* the taxation of the proceeds of life insurance policies is to be based upon an analogy to the taxing of joint tenancies and tenancies by the entirety, it follows that but one-half of the proceeds of such life insurance policies here involved could be subjected to the Federal Estate Tax Act, since the wife has contributed one-half of the funds with which the life insurance was acquired.

If section 302(g) of the Revenue Act of 1926 were given any other construction than is here urged by *amicus curiae* a serious constitutional question, based upon the application of the Fifth Amendment to the Constitution of the United States, would be presented to this Court.

> *Hoeper v. Tax Com. of Wis.,* 284 U. S. 206, 52 Sup. Ct. 120, 76 L. Ed. 248 (1931).

Since, in the instant case, the generating source of the wife's interest is to be found in the fact that during the life of the decedent and herself her interest became fixed and vested, the proceeds of the life insurance cannot be included in decedent's gross estate for taxation purposes.

> *Heiner v. Donnan,* 285 U. S. 312, 52 Sup. Ct. 358, 76 L. Ed. 772 (1932);
>
> *Levy v. Wardell,* 258 U. S. 542, 42 Sup. Ct. 396, 66 L. Ed. 758 (1922);
>
> *Shukert v. Allen,* 273 U. S. 545, 47 Sup. Ct. 461, 71 L. Ed. 764 (1927).

Furthermore, the mere fact that upon the death of the insured monies become payable from the insurance company is not, in itself, deemed a shifting of economic incidents so as to constitute a taxable transaction.

> *Bingham v. United States,* 296 U. S. 211, 56 Sup. Ct. 180, 80 L. Ed. 160 (1935).

This Court has consistently held that where one of two plausible constructions can be placed upon a statute that which does not involve the constitutionality of the statute should be adhered to.

> *Lucas v. Alexander,* 279 U. S. 573, 73 L. Ed. 573, 49 S. Ct. 426 (1929);
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> *Reinecke v. Northern Trust Co.,* 278 U. S. 339, 73 L. Ed. 410, 49 S. Ct. 123 (1929);
>
> *Stratton's Independence, Ltd. v. Howbert,* 231 U. S. 399, 58 L. Ed. 285, 34 S. Ct. 136 (1913).

Conclusion.

In the light of the foregoing argument and authorities it is submitted, therefore, that only one-half of the proceeds of insurance upon the life of a decedent, the premiums of which were paid with community funds in which the wife had a vested one-half interest, where said proceeds were payable to the wife of the decedent, should be included in the gross estate (less permissible exemptions), subject to the Federal estate tax.

This determination of the question presented on this appeal and argued herein by *amicus curiae* appears for the

following reasons: (1) that interest of a wife in community property under the laws of the state of Washington and in particular in the proceeds of insurance policies paid for with community funds, is an existing, fixed, and vested interest equal to the interest of the husband; (2) since section 302(g) of the Revenue Act of 1926, as amended, has been consistently reenacted in contemplation of the substance of Articles 25 and 28 of Regulations 70, the executive interpretation made in said articles, and the predecessors thereto, which were substantially the same, is controlling upon this Court, and any contrary executive interpretation by way of regulation is inapplicable as a matter of law; (3) under Article 25 of Regulations 70 payment of premiums being determinative of whether or not insurance is deemed to be taken out by the decedent, insurance paid for with community funds in which the wife has a vested one-half interest is therefore taken out by the decedent only to the extent of one-half thereof; (4) conceding, for the purposes of argument only, that the changed executive interpretation may be applied as set forth in Articles 25 and 27 of Regulations 80, even then such interpretation does not require the inclusion of more than one-half of the proceeds of the insurance, premiums of which were paid from community funds, since the legal incidents of ownership are vested equally one-half in the husband and one-half in the wife; (5) the construction of section 302(g) of the Revenue Act of 1926 here urged by *amicus curiae* would harmonize the taxing of proceeds of life

insurance policies with that of other community property and with that of the taxing of joint tenancies and tenancies by the entirety; (6) the construction of section 302(g) of the Revenue Act of 1926 here urged by *amicus curiae* would avoid the raising of serious constitutional objections.

Respectfully submitted,

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APPENDIX A.

REVENUE ACT OF 1926, AS AMENDED.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

REGULATIONS 70, PROMULGATED UNDER THE REVENUE ACT OF 1926.

"Art. 25. Taxable Insurance.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

"The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application.

On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid."

"Art. 28. Valuation of Insurance.—The amount to be returned where the policy is payable to or for the benefit of the estate is the amount receivable. Where the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, and all the premiums were paid by the decedent, the amount to be listed on Schedule C of the return is the full amount receivable, but where the proceeds are so payable and only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that proportion of the insurance receivable which the premiums paid by the decedent bear to the total premiums paid. In cases where the proceeds of a policy are made payable to the beneficiary in the form of an annuity for life or for a term of years, the present worth of the annuity at the time of death should be included in the gross estate. For the method of computing the value of such an annuity, see Article 13, subdivision (10). Where the insurance contract gives the right to receive a fixed sum of money in

lieu of an annuity, or other optional settlement, this fixed sum represents the value of the insurance for the purpose of the tax."

Regulations 80, Promulgated Under the Revenue Acts of 1926 and 1932, as Amended.

"Art. 25. Taxable Insurance.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

"The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system. Insurance is considered to be taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The decedent possesses a legal incident of ownership if the rights of the beneficiaries

to receive the proceeds are conditioned upon the beneficiaries surviving the decedent.

"Art. 27. Insurance Receivable by Other Beneficiaries. —The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

"The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word 'beneficiaries' as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money."

APPENDIX B.

REGULATIONS 37, PROMULGATED UNDER THE REVENUE ACT OF 1918.

"Art. 32. Taxable Insurance.—The statute provides for the inclusion in the gross estate of certain forms of insurance taken out by the decedent upon his own life. Two kinds of insurance are taxable: (a) all insurance payable to the estate; (b) insurance payable to individual beneficiaries to the extent that it exceeds $40,000. The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance should not be included in the gross estate, even though the application is made by the decedent, where the premiums are actually paid by some other person or corporation, and not out of funds belonging to, or advanced by, the decedent. Where the decedent takes out insurance in favor of another person or corporation, as collateral security for a loan or other accommodation, and the decedent, either directly or indirectly, pays the premiums thereon, the insurance must be considered in determining whether there is an excess over $40,000. Where the decedent assigns a policy, and retains no interest therein, and thereafter pays no part of the premiums, the insurance will not be considered in determining whether there is such a taxable excess."

"Art. 34. Insurance Receivable by Other Beneficiaries. —The estate is entitled to only one exemption of $40,000 upon insurance payable to beneficiaries other than the executor. For example, if the decedent left life insurance payable to three persons in amounts of $10,000, $40,000, and $50,000 (total $100,000), the amount of $60,000 should be returned for taxation, which is the excess of the sum of the three policies over the exempted amount. The word 'beneficiary,' as used in reference to the $40,000 exemption, means a person entitled to the actual enjoyment of the insurance money."

Regulations 63, Promulgated Under the Revenue Act of 1921.

"Art. 27. Taxable Insurance.—The statute provides for the inclusion in the gross estate of certain forms of insurance taken out by the decedent upon his own life. Two kinds of insurance are taxable: (a) all insurance receivable by, or for the benefit of the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000. The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where the premiums are actually paid by the beneficiary, who may be either a person or a corporation. Where the decedent takes out insurance in favor of another person or corporation, as collateral security for a loan or other accommodation, and either directly

or indirectly, pays the premiums thereon, the insurance must be considered in determining whether there is an excess over $40,000. The amount of the loan outstanding at decedent's death, with interest accrued thereon to that date, will be deductible in determining the net estate. (See Art. 39.) Where the decedent assigns a policy, and retains no interest therein, and thereafter pays no part of the premiums, the insurance will not be considered in determining whether there is such an excess."

Regulations 68, Promulgated Under the Revenue Act of 1924.

"Art. 25. Taxable Insurance.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

"The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid. Where

the decedent takes out insurance in favor of another person or corporation as collateral security for a loan or other accommodation and, either directly or indirectly, pays the premiums thereon, the insurance must be considered in determining whether there is an excess over $40,000. The amount of the loan outstanding at decedent's death, with interest accrued thereon to that date, will be deductible in determining the net estate. (See Art. 29.)

"Insurance payable to beneficiaries other than the estate, or for the benefit of the estate, need not be included in the gross estate of a decedent who died before the effective date of Title IV of the Revenue Act of 1918, but where the decedent assigned a policy of insurance payable to or for the benefit of his estate, or caused it to be made payable to a specific beneficiary in contemplation of or intended to take effect in possession or enjoyment at or after his death, it should be included if the assignment or change did not amount to a bona fide sale for a fair consideration in money or money's worth."